



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 11, 2022

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BOARD DECISION

Appellant: Garilynn Smith
Agency: Department of the Army
Decision Number: [2022 MSPB 4](#)
Docket Number: PH-1221-16-0010-W-1
Appeal Type: Individual Right of Action

**REASONABLE BELIEF
CONTRIBUTING FACTOR
CLEAR AND CONVINCING EVIDENCE
EXPERT TESTIMONY
ADMINISTRATIVE JUDGE BIAS**

The appellant disclosed to the media and to Congress that Air Force Mortuary Affairs Operations personnel had mishandled the cremated remains of her husband and other servicemembers by disposing of them in a landfill. The appellant, a current Federal employee, then applied for a position within the agency. The agency selected another individual instead.

Holding: The appellant proved by preponderant evidence that she made a protected disclosure that was a contributing factor in her nonselection.

1. The appellant reasonably believed that her disclosures evidenced a violation of the Department of Defense's (DOD) Mortuary Affairs Policy, which requires that the remains of servicemembers "be handled with the reverence, care, and dignity befitting them and the circumstances." Even if the policy did not specifically prohibit the dumping of servicemembers' remains in a landfill, a disinterested observer could reasonably conclude that this practice was contrary to the policy.
2. Under the knowledge/timing test of 5 U.S.C. § 1221(e), the appellant proved that her disclosures were a contributing factor in her nonselection. The relevant agency officials became aware of the appellant's disclosures in the spring of 2011, and her disclosures continued until approximately 1 month before her October 2021 nonselection.
3. The agency argued that the knowledge/timing test "also requires a reasonable person standard as to that knowledge being a contributing factor to the personnel action," and that the appellant failed to meet that standard. This is incorrect. The knowledge/timing test is a per se test and the appellant satisfied it by proving the elements of knowledge and timing alone.

Holding: The agency failed to prove by clear and convincing evidence that it would have taken the same action regardless of the appellant's disclosures.

1. The agency gave several reasons for its determination that the appellant was not a good candidate for the position in question, but none of the reasons it gave were supported by the evidentiary record. In particular, the agency's claim that the appellant had trouble getting along with coworkers was directly contradicted by her excellent rating in all categories, including "Working Relationships & Communications" on her 2010-2011 performance evaluation, as well as the praise she received on the evaluation.
2. Although none of the relevant officials were directly implicated in the appellant's disclosures, they had a motive to retaliate because the appellant's disclosures cast the DOD as a whole in a

negative light and jeopardized the agency's funding.

Holding: The administrative judge did not abuse his discretion in his evidentiary rulings and did not demonstrate bias against the agency.

1. The agency argued that the administrative judge inappropriately allowed the appellant to testify as an expert on Mortuary Affairs policy without allowing the agency to proffer expert testimony in rebuttal. However, the appellant's testimony about her understanding of Mortuary Affairs policy was not expert testimony. Nor was expert testimony material to the issue before the Board. The appellant was not required to prove that the Government's actions actually violated Mortuary Affairs policy—only that she reasonably believed they did.
2. The agency failed to show that the administrative judge harbored a bias against it such that a new adjudication would be warranted. The administrative judge's statement that "[t]he agency should be disabused of the notion that a landfill is a dignified resting place for the remains of a U.S. Army Soldier who gave his life in the service of his nation" was not a personal attack on agency counsel, but rather a measured response to the agency's appalling suggestion that dumping service members' remains in a landfill could ever qualify as "the requisite care, reverence, and dignity befitting the remains and the circumstances."

NONPRECEDENTIAL COURT DECISIONS

Holmes-Smith v. Merit Systems Protection Board, No. [2021-2235](#) (April 8, 2022) (AT-3443-21-0379-I-1) (affirming the initial decision that dismissed the appellant's Office of Workers' Compensation Programs (OWCP) benefits appeal for lack of jurisdiction; under 5 U.S.C. § 8128, the denial of a payment by OWCP is "not subject to review by another official of the United States or by a court by mandamus or otherwise")

Klein v. Office of Personnel Management, No. [2021-1770](#) (April 11, 2022) (SF-0831-20-0177-I-2) (affirming, per Rule 36 judgment, the administrative judge's decision that affirmed the Office of Personnel Management's final decision denying the appellant's application for a former spouse survivor annuity)

Cooke v. U.S. Postal Service, No. [2022-1497](#) (April 14, 2022) (DC-4324-

20-0747-I-2) (dismissing the petition for review for failure to prosecute; the petitioner failed to file the required Statement Concerning Discrimination and required Entry of Appearance form)

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